

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

74-1599

To be submitted

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**United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 74-1599**

UNITED STATES OF AMERICA,

Appellee,

—v.—

WILSON O. DAVILA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



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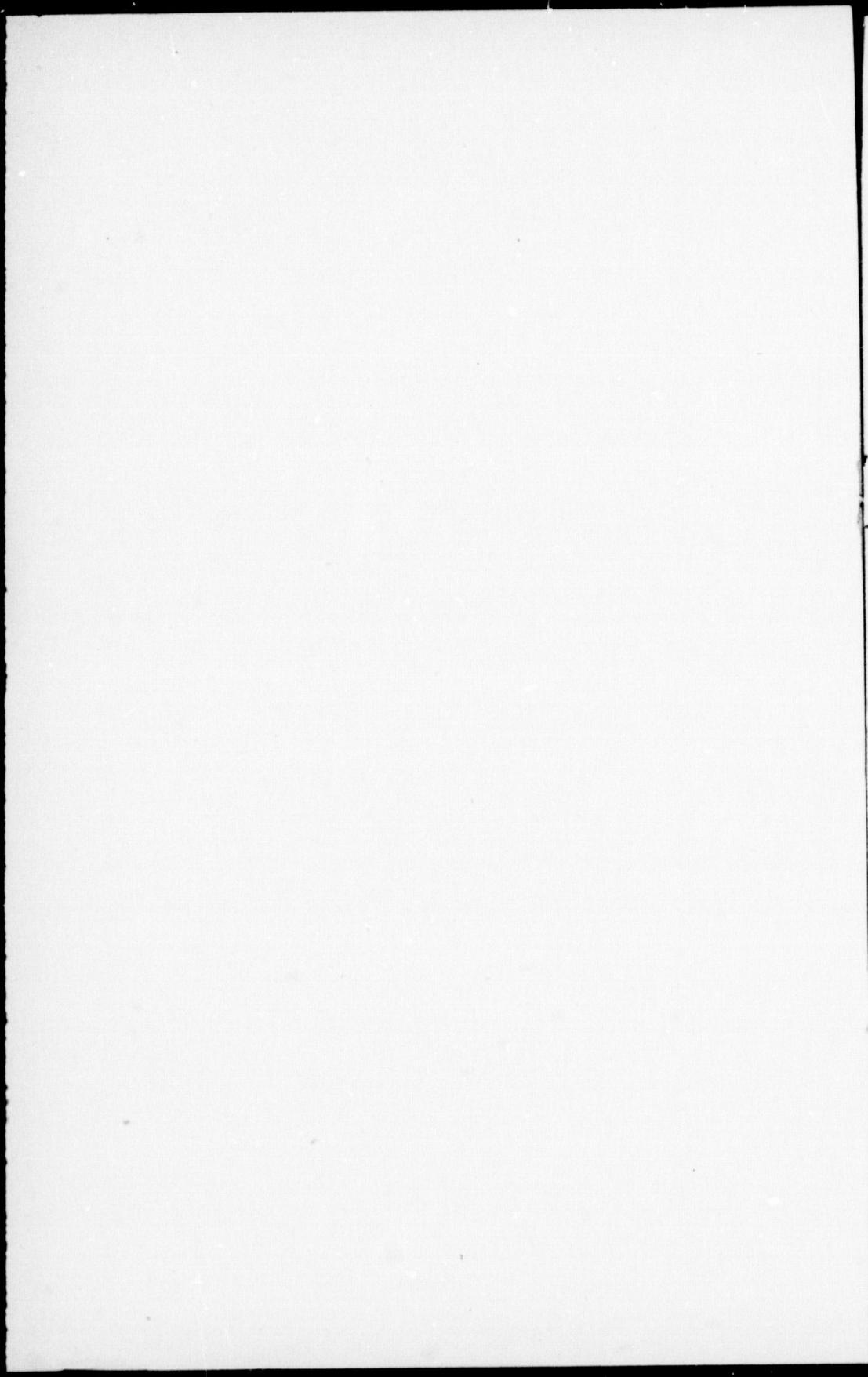


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**United States Court of Appeals
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Docket No. 74-1599

UNITED STATES OF AMERICA,

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—v.—

WILSON O. DAVILA,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Wilson O. Davila appeals from a judgment of conviction entered on May 13, 1974, in the United States District Court for the Southern District of New York, after a two-day trial before the Honorable Harold R. Tyler, Jr., United States District Judge, and a jury.

Indictment 73 Cr. 1067, filed on November 23, 1973, charged Davila and co-defendant Archie Van Putten with five violations of the federal narcotics laws. Count One charged Davila and Van Putten with conspiring to distribute Schedule I and Schedule II narcotic drug controlled substances, in violation of Title 21, United States Code, Section 846. Counts Two through Five each charged that on July 30, 1973, Davila and Van Putten distributed and possessed with intent to distribute various quantities of cocaine and heroin in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

The trial of Davila commenced on March 11, 1974.* On March 13, 1974, the jury returned guilty verdicts on Counts One, Two and Three.**

On May 10, 1974, Davila was committed to the custody of the Attorney General for treatment and supervision pursuant to Title 18, United States Code, Section 5010(b), as extended by Title 18, United States Code, Section 4209, until discharged pursuant to Title 18, United States Code, Section 5017(c).*** Davila is presently in custody.

Statement of Facts

The Government's Case

On July 30, 1973, at about 3:00 P.M., Van Putten met Davila in the lobby of a building at Amsterdam Avenue and 62nd Street in Manhattan (Tr. 97-98, 116-17). Davila gave Van Putten 1.94 grams of 50.05% pure cocaine, which Davila instructed Van Putten to sell as a sample for \$50 (Tr. 62, 98-99).

By prearrangement Van Putten met Special Agent Donald Ferrarone of the Drug Enforcement Administration, known to Van Putten as "Dominick," at approximately 4:00 P.M. in the parking lot of the Bronx-Whitestone Motel (Tr. 28, 99, 113). Van Putten gave the sample to Ferrarone, who expressed dissatisfaction with its quality (Tr. 14, 100). Ferrarone was told that Van Putten could obtain one-half kilogram of the same quality cocaine, the price for which would be \$10,000 (Tr. 14). Ferrarone asked the price for

* Van Putten pleaded guilty to Count One.

** The Government withdrew Count Four, and Count Five was dismissed by the Court.

*** On April 1, 1974, Judge Tyler sentenced Van Putten to three years imprisonment, execution suspended, and three years probation.

one-half kilogram of higher quality cocaine, and Van Putten said he would have to make a telephone call to find out (Tr. 14-15, 100). Van Putten went inside the Motel and called Davila, who said that he could get the better quality cocaine but did not have it at that time (Tr. 100). Van Putten returned to Ferrarone and informed him the price would be \$11,000 or \$11,500 (Tr. 15). Van Putten said he was going home to await the arrival of his "people" with the cocaine and that the "people" would insist on being present when Van Putten sold the half-kilogram to Ferrarone (Tr. 16-17). Van Putten and Ferrarone agreed to meet at the motel parking lot at approximately 7:00 P.M. that evening (Tr. 16).

At approximately 7:15 P.M. Davila called Van Putten at his residence in the Bronx and asked him to pick up the cocaine (Tr. 101). Van Putten went to the building at Amsterdam Avenue and 62nd Street, but returned home because Davila had not yet acquired the half-kilogram (*id.*). Because Van Putten had not arrived at the parking lot, Ferrarone placed a telephone call to Van Putten, whose wife said he was not home and would return in forty-five minutes (Tr. 17). After Van Putten returned home he was informed by Davila over the telephone that the cocaine had been acquired and that Davila was leaving to pick up Van Putten (Tr. 101). Ferrarone made another telephone call to Van Putten, who said that his "people" were on their way and that he would be at the Motel at approximately 9:15 P.M. (Tr. 17-18).

Davila, accompanied by his brother Rey, picked up Van Putten and drove to Fordham Road and Washington Avenue in the Bronx. Van Putten asked for the package; Davila said it was beside Van Putten on the rear seat. Van Putten took the package, which contained 490.4 grams of 42.7% pure cocaine (Tr. 63-64, 102). Davila refused to drive Van Putten to the Motel, so Van Putten went there in a taxi, followed by Davila (Tr. 102).

Van Putten got out of the taxi near a ramp leading to the motel parking lot and entered the parking lot on foot (Tr. 102-103). Davila drove into the parking lot, came to an almost complete stop in front of Ferrarone's car, looked at Ferrarone, then parked about two car widths away and continued to watch Ferrarone (Tr. 19, 47, 49).

Van Putten then got into Ferrarone's car and delivered the cocaine (Tr. 19, 103). Ferrarone asked Van Putten if the cocaine belonged to the occupants of the other car, and Van Putten said yes (Tr. 20). Ferrarone said he was going to examine the cocaine and did not want to be seen (*id.*). Van Putten left Ferrarone's car, walked over to Davila's car and told him to leave (Tr. 20, 103). Van Putten returned to Ferrarone and said his "people" wanted their money (Tr. 20). Ferrarone gave a prearranged signal to other D.E.A. agents and Van Putten, Wilson Davila and Rey Davila were arrested.

When Davila was taken to D.E.A. headquarters for processing, he denied knowing Van Putten (Tr. 27).

The Defense Case

Davila testified on his own behalf. He said that at the time of the crimes charged in the indictment he lived at 640 West End Avenue in Manhattan (Tr. 154). Davila said he met Van Putten in July, 1973, and shortly thereafter had purchased from Van Putten a small quantity of cocaine for his own personal use (Tr. 161).

Davila claimed that he called Van Putten on July 30, 1973, and arranged to purchase another small quantity of cocaine (Tr. 162). When Davila arrived at Van Putten's residence Van Putten offered to give the cocaine to Davila if he would provide Van Putten with transportation to an unspecified location (*id.*). Davila testified that he initially accepted Van Putten's offer but later reneged when his

brother advised him not to get involved with Van Putten because he did not know him very well (Tr. 163). Davila said that Van Putten then offered to give Davila some cocaine if Davila would provide the return transportation from Van Putten's destination; Davila accepted that proposal and followed the cab Van Putten hailed (Tr. 163-164).

Davila said he entered the motel parking lot upon Van Putten's instructions (Tr. 164). Davila also testified that, during his conversation with Van Putten in the parking lot, Van Putten said the transaction would take some time, and Davila said he was going to leave (*id.*).

Davila claimed that, after his arrest, he gave the agents the same explanation for his presence in the Motel parking lot, "more or less," as given during his testimony (Tr. 165).

Upon cross-examination Davila denied telling Ferrarone that he did not know Van Putten (Tr. 167). Davila admitted he had told an Assistant United States Attorney that he refused to give Van Putten a ride to the parking lot because Van Putten was "dirty" (had drugs in his possession), even though both Davila and his brother Rey had been carrying marijuana that night and Rey had also had some cocaine (Tr. 168-169). Davila further admitted spending more time with girl friends who lived at Amsterdam Avenue and 62nd Street than at the address on West End Avenue, which was, in fact, his parents' address (Tr. 173-174).

Gilberto Rodriguez testified that he introduced Van Putten to Davila on a Thursday night in the middle of July, 1973 (Tr. 151).*

* Van Putten testified on cross-examination that Rodriguez made the introduction around March, 1973, that Van Putten had acquired narcotics from Davila on three or four prior occasions beginning in May or June, 1973, and that Van Putten had seen Davila at various dances once a week between March and July, 1973 (Tr. 104-106, 111, 132-133).

Finally, Davila introduced into evidence a copy of a document from the East Orange Veterans Administration Hospital which showed that Davila had been hospitalized for a liver disorder from February 28, 1973 until May 11, 1973 (A. 54-55).

ARGUMENT

The evidence of Davila's guilt was overwhelming, and the trial judge's charge on accomplice testimony was more than adequate.

Davila claims that the evidence was insufficient to sustain his conviction on any count of the indictment. Such contention is frivolous.

Of course, after conviction evidence must be viewed in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Arroyo*, 494 F.2d 1316, 1317 (2d Cir. 1974). Davila's argument is essentially that he was convicted on the uncorroborated testimony of an accomplice. Even if factually accurate that position would be legally insufficient. *Caminetti v. United States*, 242 U.S. 470 (1917); *United States v. Messina*, 481 F.2d 878, 881 (2d Cir.), cert. denied, 414 U.S. 974 (1973); *United States v. Ferrara*, 458 F.2d 868, 871 (2d Cir.), cert. denied, 408 U.S. 931 (1972); *United States v. Phillips*, 426 F.2d 1069, 1071 (2d Cir.), cert. denied, 400 U.S. 843 (1970); *United States v. Marks*, 368 F.2d 566 (2d Cir. 1966), cert. denied, 386 U.S. 933 (1967); *United States v. Agueci*, 310 F.2d 817, 833 (2d Cir. 1962), cert. denied as *Guippone v. United States*, 372 U.S. 959 (1963). However, in this case the testimony of Davila's accomplice, Van Putten, was amply corroborated by the testimony of Agents Ferrarone and Levine about Davila's presence and suspicious behavior in the parking lot, *United States v. D'Amato*, 493 F.2d 359, 360-363 (2d Cir. 1974),

United States v. Barrera, 486 F.2d 333 (2d Cir. 1973); *United States v. Wisniewski*, 478 F.2d 274, 279-280 (2d Cir. 1973), by Davila's concededly false exculpatory statement to an Assistant United States Attorney and his earlier one to Agent Ferrarone, *United States v. Lacey*, 459 F.2d 86, 89-90 (2d Cir. 1972), and by his inherently incredible testimony at trial. *United States v. Tramunti*, Dkt. No. 74-1398 (2d Cir., July 12, 1974), slip op. at 4814.

Similarly, Davila's complaint about Judge Tyler's charge on accomplice testimony (Tr. 234-235, 240-241) is without merit. Judge Tyler's instructions to the jury on this point, which emphasized that the jury should carefully scrutinize Van Putten's possible motives for testifying falsely, was certainly no less favorable to Davila than the accomplice charges approved in *United States v. Tyers*, 487 F.2d 828, 831 & n. 1 (2d Cir. 1973), and *United States v. Projansky*, 465 F.2d 123, 136 (2d Cir.), cert. denied, 409 U.S. 1006 (1972), and in fact accorded Davila more favorable treatment than the law required. See *United States v. Mattio*, 388 F.2d 368, 369-370 (2d Cir.), cert. denied, 390 U.S. 1043 (1968). In any event, since Davila neither requested a charge on accomplice testimony nor objected below to the charge Judge Tyler gave, he is foreclosed from raising this claim for the first time on appeal. Fed. R. Crim. P. 30; *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U.S. 907 (1966).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Anaselle Cheney being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the 7 day of *August 1974*
he served a copy of the within
by placing the same in a properly postpaid franked
envelope addressed:

William A. Sulaham Esq
15 Front Street
Rockville Center, NY 11571

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Anaselle Cheney

Sworn to before me this

7th day of August 1974

RICHARD WILE
Notary Public, State of New York
No. 31-9670350
Qualified in New York County
Commission Expires March 30, 1976

Richard Wile

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